UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MOHAMAD IBRAHIM SHNEWER	:	Honorable Robert B. Kugler
	:	Civ. No. 13-3769 (RBK)
	:	Crim. No. 07-459 (RBK)
v.	:	
	:	
UNITED STATES OF AMERICA	:	

UNITED STATES' RESPONSE TO PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION UNDER 28 U.S.C. § 2255 TO VACATE SENTENCE

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Introduction

In petitioner Mohamad Ibrahim Shnewer's "Memorandum Of Law In Support Of His Motion Under 28 U.S.C. § 2255 To Vacate Sentence," ("SML") Docket 13,[1] he raises no challenges to his convictions, effectively conceding that he was properly convicted at trial. Rather, he raises two challenges to his sentence, under the guise of ineffective assistance of prior counsel, Rocco Cipparone, Esquire, and claims that Mr. Cipparone was ineffective for failing to apprise Shnewer of negotiations with the Government regarding a possible plea agreement.

In support of this responsive brief, the Government has submitted, as Exhibit A hereto, the Declaration of Mr. Cipparone. The Government continues to rely on the Declaration of William Fitzpatrick, the lead prosecutor at trial, which was attached to the Government's Motion to Dismiss Shnewer's petition. Docket 10-1. As shown herein, and notwithstanding Shnewer's presentation of a very limited affidavit from co-defendant Shain Duka, there are no disputed issues of material fact for this Court to resolve at an evidentiary hearing. Accordingly, because "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that

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[1] All references herein to "Docket __" are to the docket numbers of documents filed in the § 2255 civil case, Shnewer v. United States, 13-cv-3769.

[Shnewer] is not entitled to relief," this Court "must dismiss the motion and direct the clerk to notify the moving party." Rule 4 of Rules Governing § 2255 Proceedings, 28 U.S.C.A.[2]

Facts and Procedural History

On direct appeal, the Third Circuit briefly summarized the evidence presented at the two and one-half month trial as follows:

> Shnewer, the Duka brothers, and Tatar are a group of young men who lived in New Jersey and developed an interest in violent jihad, particularly attacks against the United States military. Defendants, who had known each other since high school, came to the FBI's attention after it received a copy of a video that was brought to a Circuit City store in Mt. Laurel, New Jersey, for copying. The video dated from January 2006 and depicted the five defendants and others at a firing range in the Pocono Mountains, shooting weapons and shouting "Allah Akbar!" and "jihad in the States."
>
> Over the course of the next sixteen months, the FBI deployed two cooperating witnesses, Mahmoud Omar and Besnik Bakalli, to monitor defendants' activities. The evidence presented at trial showed that, between January 2006 and May 2007, defendants viewed and shared videos of violent jihadist activities, including beheadings, around the world; they viewed and shared videos of lectures advocating violent jihad against non-Muslims; they sought to acquire numerous weapons, including automatic firearms and rocket-propelled grenades; they returned to the Poconos, where they again engaged in shooting practice; they discussed plans to attack the United States military; they conducted research and surveillance on various potential targets for such an attack in New Jersey, Pennsylvania, and Delaware;

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[2] On the same day (March 5, 2014) that he filed the SML, Shnewer also filed his response (Docket 12) to the Government's motion to dismiss Shnewer's § 2255 petition (Docket 12). The Government will not file a reply to Shnewer's response, as all of the issues addressed in the Government' motion to dismiss are more fully discussed in this memorandum.

and they procured a map of the United States Army Base at Fort Dix to use in planning and coordinating such an attack.

With respect to the individual defendants, the evidence demonstrated the following:

Mohamad Shnewer is a naturalized American citizen who was born in Jordan. He admired and sought to emulate the "nineteen brothers," i.e., the September 11 hijackers, Osama bin Laden, and the leader of al Qaeda in Iraq, Abu Musab al-Zarqawi. Shnewer openly discussed and planned attacks on military targets in New Jersey, Pennsylvania, and Delaware. Along with Omar, the government informant, he staked out the United States Army Base at Fort Dix, McGuire Air Force Base, Lakehurst Naval Air Station, and the United States Army Base at Fort Monmouth in New Jersey; the United States Coast Guard Base in Philadelphia, Pennsylvania; and Dover Air Force Base in Delaware. Shnewer also considered attacking the federal government building at 6th and Arch Streets in Philadelphia and drove by the building to determine whether such an attack would be feasible. To accomplish an attack on these targets, Shnewer proposed deploying a gas tanker truck as a bomb, using roadside bombs or surface-to-air missiles, and spraying military targets with machinegun fire. He sought to acquire AK–47 machineguns from Omar to use in such an attack.

Dritan, Shain, and Eljvir Duka are brothers who were born in Albania. During the events that were the subject of the trial, they were in the United States illegally. In 2006 and 2007, the Dukas took at least two trips to the Poconos to train for jihad by firing weapons, attempting to buy automatic weapons, discussing jihad, and watching violent jihadist videos. The Dukas befriended government informant Bakalli, a fellow Albanian, and encouraged him to join them in avenging Muslims who had been oppressed by the United States and Israel. They viewed and praised a lecture, Constants on the Path to Jihad, by Anwar al-Awlaki, the prominent cleric and proponent of attacks against the United States military, and videos depicting attacks on American soldiers by violent jihadists in Iraq and elsewhere. In recorded conversations presented at trial, the Dukas described beheadings depicted in the videos as just punishment for traitors. The Dukas watched the beheading videos over and over again until they became inured to the spectacle. Dritan told Bakalli that, although

> at first he "couldn't take it," "[n]ow I see it and it's nothing, I do not care. I saw hundreds being beheaded." Similarly, Eljvir told Bakalli that the beheadings were difficult to watch at first, but that "[n]ow we can watch it no problem."
>
> Like Shnewer, the Dukas sought to acquire firearms to further their plans. They could not acquire weapons lawfully because they were in the country illegally, so they turned to the black market. By January 2007, the three brothers told Bakalli they had acquired a shotgun, two semi-automatic rifles, and a pistol, and they continued to look for opportunities to buy machineguns.
>
> Later that spring, Dritan Duka ordered nine fully automatic weapons — AK–47s and M–16s — from a contact of Omar's in Baltimore. The FBI arranged a controlled transaction, and, on May 7, 2007, Dritan and Shain Duka went to Omar's apartment to retrieve their weapons. After handing Omar $1,400 in cash, Dritan and Shain examined and handled four fully automatic machineguns and three semiautomatic assault rifles. They asked Omar for garbage bags to conceal the weapons (so they would look like golf clubs) as they carried them out to the car. Before they could get there, however, federal and state law enforcement officers entered Omar's apartment and arrested them. The entire transaction was captured on video by equipment installed in Omar's apartment by the FBI and was shown to the jury at trial.
>
> Serdar Tatar is a lawful permanent resident in the United States who was born in Turkey. Tatar appears in the video of defendants' January 2006 training trip to the Poconos. After extensive discussions with Omar about Shnewer's plan to attack Fort Dix, Tatar agreed to help by providing Omar with a map of Fort Dix to use in planning such an attack. Regarding the overall plan to attack Fort Dix, Tatar told Omar in a recorded conversation, "I'm in, honestly, I'm in."

United States v. Duka, 671 F.3d 329, 332-35 (3d Cir. 2011).

On January 15, 2008, a grand jury sitting in Camden, New Jersey returned a superseding indictment, charging the defendants with:

- Count 1: conspiracy to murder members of the United States military, in violation of 18 U.S.C. §§ 1114 and 1117 (all defendants);

- Count 2: attempt to murder members of the United States military, in violation of 18 U.S.C. § 1114 (all defendants);

- Count 3: possession or attempted possession of firearms in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(1)(B)(ii) (Dritan, Eljvir, and Shain Duka);

- Count 4: attempted possession of firearms in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(1)(B)(ii) (Shnewer);

- Count 5: possession of machineguns in violation of 18 U.S.C. § 922(o) (Dritan and Shain Duka); and

- Counts 6 and 7: possession of firearms by an illegal alien in violation of 18 U.S.C. § 922(g)(5) (Dritan and Shain Duka (2 counts); Eljvir Duka (1 count)).

Following a two and one-half month trial, the jury convicted all five defendants of the Count One murder conspiracy charge, acquitted all of the Count Two attempted murder charge, and convicted Shnewer and the Dukas of various firearms offenses. The jury acquitted Eljvir Duka of the Count Three firearms offense. Crim. Docket 371.

This Court imposed life sentences on all defendants except Tatar for the conspiracy count, who was sentenced to 396 months in prison. The Court imposed mandatory consecutive sentences for the § 924(c) convictions, and concurrent sentences for the other firearms convictions. Crim. Dockets 417, 419, 421, 425, and 427 (judgment as to Tatar).

On direct appeal, the Third Circuit accepted the Government's concession that it had erroneously charged Shnewer, Dritan Duka, and Shain Duka with a non-offense: attempted possession of a firearm in furtherance of a crime of violence, and vacated Shnewer's conviction on that count (Count Four). 671 F.3d at 353-54. Because Dritan and Shain had also been charged with a completed violation of § 924(c) (Count Three), and because the evidence and arguments of counsel showed that the jury convicted those defendants of the completed, rather than an attempted offense, the Court of Appeals affirmed their § 924(c) convictions. Id. at 355-56. The Court also affirmed all defendants' convictions for conspiracy to commit murder. Id. at 356.[3]

[3] The Supreme Court denied Shnewer's petition for a writ of certiorari on June 11, 2012. 132 S.Ct. 2756 (2012). The one-year period of limitations for the filing of Shnewer's § 2255 motion therefore expired on June 11, 2013. See Kapral v. United States, 166 F.3d 565, 571 (3d Cir. 1999). Shnewer attested in his pro se § 2255 motion the he placed the motion in the prison mailing system on June 7, 2013. Docket 1, p. 15. The motion was received by the Clerk's Office on June 17, 2013. Id.

Placing a piece of legal mail in the prison mail system by a pro se incarcerated inmate constitutes "filing" for the purposes of 28 U.S.C. § 2255. See Grady v. United States, 269 F.3d 913, 916 (8th Cir. 2001); Faines v. United States, 808 F.Supp.2d 708, 711 (D.Del. 2011); see generally Houston v. Lack, 487 U.S. 266, 275–76 (1988). The Government has no basis to

Argument

Shnewer Cannot Meet His Affirmative Burden for Obtaining Ineffectiveness Relief under 28 U.S.C. § 2255.

A defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 464 U.S. 668, 686, 694 (1984). "[T]he burden to 'show that counsel's performance was deficient rests squarely on the defendant." Burt v. Titlow, 134 S.Ct. 10, 17 (2013) (quoting Strickland, 466 U.S. at 687). In determining whether counsel's conduct was deficient, the court must consider the totality of the circumstances of the case and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688–89.

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." United States v. Gray, 878 F.2d 702, 710 (3d Cir. 1989). "Therefore, failure to

contest the accuracy of Shnewer's attestation of the mailing date, and does not claim that Shnewer's petition is untimely.

satisfy either prong of the Strickland analysis is grounds for dismissal." Giblin v. United States, 2010 WL 3039992, *6 (D.N.J. 2010) (Kugler, J.).

Regarding the "deficient performance" prong, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, assessing the facts of the case at the time of counsel's conduct. Strickland, 466 U.S. at 688–89; Jacobs v. Horn, 395 F.3d 92, 102 (3d Cir. 2005). Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 688. As for the prejudice prong, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

A. Mr. Ciparrone Was Not Ineffective For Allegedly Failing To Make A Compelling Case For A Downward Variance Based On Alleged Disparity With Similarly Situated Defendants.

Shnewer claims that this Court erred because it did not give sufficient consideration to the requirement that the sentence imposed not create an "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," as mandated by 18 U.S.C. § 3553(a)(6). See SML1-2, 4-8. But Shnewer never claimed at sentencing or on direct appeal that this Court failed to conduct a sufficient disparity analysis, so his reliance on a slew of cases in which such a claim was preserved and raised on direct appeal have no application here.[4]

Relief under 28 U.S.C. § 2255 is not available to correct errors that could have been raised at trial or on direct appeal, United States v. Essig, 10 F.3d 968, 979 (3d Cir. 1993)), as such claims are "procedurally barred," United States v. Jenkins, 333 F.3d 151, 155 (3d Cir. 2003). See also Hodge v. United States, 554 F.3d 372, 379 (3d Cir. 2009) ("Put differently, a movant has procedurally defaulted all claims that he neglected to raise on direct appeal.").

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[4] In this regard, Shnewer cites United States v. Friedman, 658 F.3d 342 (3d Cir. 2011); United States v. Merced, 603 F.3d 203 (3d Cir. 2010); United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008); United States v. Grier, 475 F.3d 556 (3d Cir. 2006); and United States v. Lowry, 480 F. App'x 133 (3d Cir. 2012) (not precedential). SML5. He also cites United States v. Ashburn, 502 F.3d 313 (3d Cir. 2007); United States v. Begin, 696 F.3d 405 (3d Cir. 2012), and Merced in support of the proposition that a sentencing court "must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis." SML8-9.

All of those case arose on direct appeal, however, not in the context of a § 2255 motion. Unlike the defendants in those cases, Shnewer is not presenting a preserved claim of sentencing error in his § 2255 motion. Rather, he is raising a claim that prior counsel was ineffective for failing to sufficiently press that claim at sentencing and failing to raise it all on direct appeal. Shnewer, unlike the defendants in the cases he cites, must meet his affirmative burden of demonstrating ineffective assistance, and is not entitled to relief merely by showing legal error, as the appellants in the cases he cites were able to do.

Consequently, Shnewer is not entitled to relief unless he can meet his strenuous burden for showing ineffective assistance, because "courts will exempt a movant from [the procedural default rule] if he can prove ... that there is a valid cause for the default, as well as prejudice resulting from the default." Hodge, 554 F.3d at 379. Ineffective assistance of counsel claims that, if proven, would rise to the level of Sixth Amendment violations, constitute sufficient cause to excuse procedural default. Id. (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991) and Wise v. Fulcomer, 958 F.2d 30, 34 n.9 (3d Cir. 1992)).

1. Having Argued that § 3553(a)(6) Did Not Prevent A Downward Variance, Mr. Cipparone Reasonably Declined To Argue That § 3553(a)(6) Required A Variance.

But Shnewer cannot meet that burden. In his twenty-nine page sentencing memorandum in this case, Mr. Cipparone requested a downward variance from the Guidelines range of life imprisonment to a sentence of thirty-five years incarceration. He argued that a thirty-five year sentence would not create an unwarranted disparity with the sentences of similarly situated defendants. See Shnewer Sentencing Memorandum, United States v. Shnewer, Dist. Ct. 07-459 (RBK) (Sealed Exhibit A hereto), at p. 28.

a. This Court's Ruling Regarding § 3553(a)(6) Was Sufficient Under The Circumstances.

This Court rejected Mr. Cipparone's request for a thirty-five year sentence. Because Mr. Cipparone did not highlight § 3553(a)(6) in his sentencing submission, other than to say that it would not preclude a sentence of thirty-five years, this Court accurately pointed out that "[t]he sentence disparity is really not an issue in this case." See Shnewer Sentencing Transcript, p. 51.

Shnewer's principal contention in this point is that, although the role of § 3553(a)(6) in this case was presented by Mr. Cipparone at sentencing and addressed by this Court, Mr. Cipparone should have made a different argument regarding § 3553(a)(6): that comparison of the facts of this case with other, similar cases militated in favor of a lower sentence in order to avoid unwarranted disparity. SML8-22. As will be shown herein, that claim fails.

Shnewer also claims that Mr. Cipparone "was ineffective in failing to object to the sentencing court's failure to give meaningful consideration to the need to avoid unwarranted sentencing disparities." SML2; see also SML2-8. But Shnewer's claim that more should have been said and done by Mr. Cipparone and this Court regarding § 3553(a)(6) would likely have failed if presented on direct appeal. See United States v. Thomas, 435

F. App'x 117, 120-21 (3d Cir. 2011) (rejecting a claim that the district court failed to adequately address a § 3553(a)(6) variance request, even though the court did not explicitly address § 3553(a)(6), where the court expressly rejected the general request for a downward variance and explained why the conviction for resisting arrest was a crime of violence and why defendant's specific history justified a sentence within the Guidelines range). See generally Gall v. United States, 552 U.S. 38, 53 (2007) (reversing the court of appeals' finding that sentence was unreasonable, where the district court "committed no significant procedural error," "correctly calculated the applicable Guidelines range, allowed both parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning.")

Mr. Cipparone reasonably declined to object to this Court's statement, Shnewer Sent Tr. 51, that a life sentence for Shnewer would not create unwarranted disparities, particularly since the sentence was within the applicable guidelines range. Extended discussion of § 3553(a)(6) considerations is never required when the court imposes a within guidelines range sentence because "avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges," so when "the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." Gall, 552 U.S. at 54. By imposing a sentence within the properly calculated Guidelines range, this Court necessarily took into account possible disparities with other similar cases.

Moreover, this Court was correct when it concluded, in effect, that § 3553(a)(6) would not be violated if the Court imposed a sentence of life imprisonment in this case, consistent with the properly calculated Guidelines range. There would be no unwarranted disparity resulting from that sentence because there were no other cases that were substantially similar to this case in which the defendants had received substantially lower sentences. After all, this was hardly a run-of-the-mill felon in possession or unlawful reentry of a deported alien case. Rather, this was a sui generis case involving "home grown" jihadists bent on attacking innocent Americans, whether at a United States military base, a United States Courthouse, the Army-Navy football game, or elsewhere, using sophisticated military weapons. Although Shnewer now points to other cases that he contends were substantially similar to this case, only one of those cases was brought to the attention of the District Court at sentencing. Moreover, as explained below, none were of those cases so similar to this case that a downward variance based on 18 U.S.C. § 3553(a)(6) would have been appropriate.

The brevity or length of a sentencing court's explanation for the sentence, and the specificity with which a court addresses a party's arguments, is largely a matter of the "judge's own professional judgment." Rita v. United States, 551 U.S. 338, 356 (2007). See also id. at 358-59 (district court's determination that the Guidelines range was not "inappropriate" was sufficient, even though the court did not specifically address the defendant's three arguments for a downward variance, where it was clear from the record that the sentencing judge had "listened to," was "fully aware of," "understood," and "considered" Rita's three arguments). This Court's discussion of § 3553(a)(6), albeit brief, was sufficient, because it was not required to "discuss and make findings as to each of the § 3553(a) factors if the record makes clear the court took the factors into account in sentencing." United States v. Cooper, 437 F.3d 324, 332 (3d Cir.2006), abrogated on other grounds by Kimbrough v. United States, 552 U.S. 85 (2007).

b. Mr. Cipparone's Modest Reliance On § 3553(a)(6) Was Reasonable.

Additionally, the amount of effort that Mr. Cipparone devoted to a § 3553(a)(6) claim cannot be considered in a vacuum, as Shnewer would have it in his § 2255 motion. Rather, this Court must "look at the totality of counsel's performance and will not take any of his actions out of context in order to ascertain whether they are, by themselves, ineffective." Kavanagh v. Berge, 73 F.3d 733, 735 (7th Cir. 1996). Mr. Cipparone was entitled to use his professional judgment to focus upon the grounds that he reasonably believed would yield the lowest possible sentence for Shnewer, and downplay others, such as a variance request based on § 3553(a)(6). Shnewer's present claim to the contrary is merely an appeal to "the distorting effects of hindsight," Strickland, 466 U.S. at 689, which a court must make "every effort . . . to eliminate" when reviewing an ineffectiveness claim, id.

At sentencing, Mr. Cipparone reasonably concentrated his efforts on challenging the application of the terrorism enhancement, U.S.S.G. § 3A.14, and the enhancement for targeting official victims, U.S.S.G. § 3A1.2, to the calculation of the offense level. See Shnewer Sentencing Memorandum, § I(A) (challenge to application of the official victim enhancement) and § I(B) (challenge to application of the terrorism enhancement)). When this Court nevertheless applied both of those enhancements, Shnewer challenged those rulings on direct appeal. See Exhibit B hereto, Table of Contents for Appellants' Joint Opening Brief, United States v. Shnewer et al., Third Circuit No. 09-2299, Points IX and X (challenging application of the terrorism enhancement and the official victim enhancement, respectively).

Had Mr. Cipparone prevailed on his challenge to the application of the terrorism enhancement, Shnewer's guidelines range would have been reduced by 12 levels to offense level 39 and his criminal history reduced to category I. See U.S.S.G. § 3A1.4(a) & (b); Shnewer PSR ¶¶ 273, 281. The resulting Guidelines range would have fallen to 262-327 months. U.S.S.G., Chapter Five, Part A, Sentencing Table. Had Mr. Cipparone further prevailed on the official victim issue, his offense level would have been further reduced by 6 levels to 33, U.S.S.G. § 3A1.2(b), Shnewer PSR ¶ 272. This would have generated a Guidelines range of 135 to 168 months. U.S.S.G. Sentencing Table. In that event, Mr. Cipparone could have argued more persuasively for a sentence lower than life imprisonment. Mr. Cipparone exercised reasonable professional judgment by focusing his sentencing presentation on the issues that he reasonably concluded had a better chance of reducing Shnewer's sentence, and not cluttering his sentencing submission with an elongated argument about § 3553(a)(6) that Shnewer, in hindsight, now advocates.

c. Shnewer's Claim That Judicial Decisions In Other Cases Would Have Caused This Court To Lower His Sentence Pursuant to § 3553(a)(6) Does Not Demonstrate Ineffective Assistance.

Shnewer points to four particular judicial decisions that he claims Mr. Cipparone should have cited to this Court at sentencing in support of an argument that a life sentence would be unduly disparate with the "less than life" sentences imposed in those cases. SML9-17. In United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008), the Third Circuit rejected a similar claim to that presented in Shnewer's § 2255 motion:

> That [an appellant] can find another case where a defendant charged with a somewhat similar crime and facing the same advisory sentencing range received a sentence outside of the applicable sentencing range does not make [defendant's] within-Guidelines sentence unreasonable. If that were the law, any sentence outside of the Guidelines range would set precedent for all future similarly convicted defendants. This is not, and cannot be, the law.

Id. at 91.

Additionally, only one of the cases now cited by Shnewer involved a guidelines range of life imprisonment across the board, as Shnewer's case did. Indeed, one of those cases (Kikumura) involved a guidelines range of only 27 to 33 months. Consequently, Shnewer cannot "not meet his burden of 'demonstrat[ing] similarity by showing that other defendants' circumstances exactly paralleled his." United States v. Iglesias, 535 F.3d 150, 161 n.7 (3d Cir. 2008); accord, United States v. Bannout, 509 F. App'x. 169, 172 (3d Cir. 2013) (not precedential). "[A] court should not consider sentences imposed on defendants in other cases in the absence of such a showing [that "the circumstances [of the comparison case] exactly paralleled [the case under review]." Iglesias, 535 F.3d at 161 n.7.

In the only case in which defendants faced a Guidelines range that was substantially similar to Shnewer's, United States v. Amawi, 695 F.3d 457 (6th Cir. 2012), the sentences were imposed in October 2009, more than five months **after** Shnewer was sentenced in this case, on April 29, 2009. See Exhibits C, D, and E (judgments for Mohamad Amawi, Mawan El-Hindi, and Wassim Mazloum). Mr. Cipparone could not have been ineffective for declining to bring to the attention of this Court an event that had not yet occurred. See Premo v. Moore, 131 S.Ct. 733, 741 (2011) (assessment of ineffectiveness claim must be addressed to the "information then available to counsel" when he made the challenged decision or failed to undertake certain action).

And in Amawi itself, the Court rejected the Government's claim in its cross-appeal from the sentences on the ground that they violated § 3553(a)(6) by comparison to several other cases involving, like the Amawi defendants, terrorism offenses. 695 F.3d at 488-89. The Court held that, although the "other cases all involve terrorist-related offenses, they bear significant factual dissimilarities that do not create any reversible tension with the district court's downward variance" in Amawi. Id. at 489.

Such dissimilarities exist between Shnewer's case and the cases he now claims that Mr. Cipparone was ineffective for declining to bring to the attention of this Court at sentencing. For instance, in United States v. Graham, 275 F.3d 490 (6th Cir. 2001) the district court properly applied the domestic terrorism enhancement, U.S.S.G. § 3A1.4, making Graham's criminal history category VI, like Shnewer's. But Graham's total offense level, even after the application of § 3A1.4 was only 41, eleven levels lower than Shnewer's. Id. at 500. Consequently, unlike Shnewer's advisory guidelines sentence of life imprisonment, Graham's corresponding guidelines range was 360 months to life. See U.S.S.G., Chapter Five, Part I (Sentencing Table). The district court imposed a fifty-five year sentence, id. at 497, and the Court of Appeals remanded for resentencing in light of the intervening decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), but otherwise agreed with the district court's sentencing decisions. Id. at 524.

On remand, the district court lowered Graham's sentence to fifty years, which the Court of Appeals again affirmed. United States v. Graham, 327 F.3d 460, 466 (6th Cir. 2003). Because Shnewer's total offense level was almost 25% higher than Graham's, any contention that a life sentence for Shnewer would have been unduly disparate to Graham's fifty year sentence is dubious at best. Mr. Cipparone did not fall below a constitutional standard of advocacy in declining to present it.[5]

In another case cited by Shnewer, United States v. Polk, 118 F.3d 286 (5th Cir. 1997), the terrorism enhancement was not applied, and the applicable Guidelines range was substantially lower than Shnewer's Guidelines range. Although the Fifth Circuit's opinion did not identify that range, the brief for appellant did, noting that the range for most of the counts was only 168 to 210 months, to which a 60 month mandatory consecutive sentence was added to establish a final range of 228 to 260 months. See 1997 WL 33562544, *7 (Brief for Appellant). The district court initially imposed a sentence of 249 months, approximately in the middle of the range. 118 F.3d at 291. The Court of Appeals held that the evidence was insufficient to support two of the convictions, including the conviction that carried the mandatory minimum sentence of 60 months, vacated those convictions, and remanded for resentencing. 118 F.3d at

[5] Shnewer also cites United States. v. Metcalf, 221 F.3d 1336 (Table) 2000 WL 924171 (6th Cir. 2000) (not precedential), which involved one of Graham's codefendants in the marijuana-trafficking and firearms conspiracy at issue in the Graham appeal. Metcalf received a forty year sentence following trial. Although the opinion did not identify the applicable guidelines range, the panel acknowledged that the sentence was within that range. 2000 WL 924171, *5.

289, 298. That ruling reduced the guidelines range to 168 to 210 months.

On remand, the district court again imposed a sentence close to the middle of the applicable range: 189 months. Polk v. United States, 2008 WL 177844, *1 (E.D. Tex. 2008) (denying § 2255 relief). Neither the range that included the mandatory minimum sentence nor the range that excluded that sentence was remotely close to the applicable guidelines recommended sentence here: life imprisonment. Consequently, like Graham, Polk did not involve facts and circumstances sufficiently close to those of Shnewer's case to strongly support a motion for a downward variance based on 18 U.S.C. § 3553(a)(6).

Shnewer also cites United States v. Kikumura, 706 F.Supp. 331 (D.N.J. 1989), but that case is entirely inapposite to the facts here. Kikumura was convicted of numerous weapons offenses, including his possession of homemade explosives, following a bench trial based on stipulated facts. Based on his criminal history category of I and his total offense level of 18, the Guidelines range was 27 to 33 months. 706 F.Supp. at 334. The District Court applied a number of upward departures (after finding that Kikumura was a member of the violent terrorist organization, the "Japanese Red Army," which had engaged in terrorist bombings) and imposed a sentence of 360 months. Id. at 334-36.

The Court of Appeals vacated that sentence and remanded for resentencing. 918 F.2d 1084 (3d Cir. 1990). On remand, the district court imposed a sentence of 260 months. See Kikumura v. United States, 978 F.Supp. 563 (D.N.J. 1997) (denying § 2255 relief, and recounting procedural history of the case), and the Third Circuit affirmed. 947 F.2d 72 (3d Cir. 1991). Because Kikumura's guidelines range was significantly shorter than Shnewer's, Mr. Cipparone did not fall below constitutional standards of effectiveness by failing to bring it to the attention of this Court as a basis for a downward variance under 18 U.S.C. § 3553(a)(6).

And Mr. Cipparone certainly was not ineffective for failing to challenge Shnewer's sentence on appeal based on § 3553(a)(6). That is because "a mere similarity [between the sentence in the case under review and a lower sentence imposed in another case] would not be enough to overcome the high level of deference we accord sentencing judges." United States v. Charles, 467 F.3d 828, 833 (3d Cir. 2006) (rejecting a § 3553(a)(6) challenge, citing United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006)). To the contrary, the Third Circuit "will tolerate statutory sentencing disparities so long as a judge demonstrates that he or she viewed the Guidelines as advisory and reasonably exercised his or her discretion after applying the three-step sentencing process." Charles, 467 F.3d at 833-34 (citing United States v. Gunter, 462 F.3d 237, 248–49 (3d Cir. 2006)).

Shnewer contends that "the fact that the guidelines ranges for defendants Graham, Metcalf, Polk, and Kikumura were calculated . . . at less than life in prison does not negate their value as benchmarks under § 3553(a)(6)." SML18. While that may be true, the dissimilarity in Guidelines ranges would have been a valid factor for this Court to consider in deciding whether the disparity between Shnewer's sentence and the sentences in those cases was "unwarranted." See United States v. Vaughn, 722 F.3d 918, 937 (7th Cir. 2013) (rejecting § 3553(a)(6) challenge to sentence that was substantially higher than the sentence for codefendant who was convicted of essentially the same criminal conduct, where the challenged sentence was within the Guidelines range, the defendant's range was higher than the codefendant's, and the "distinctions [between the defendants] resulted in considerably different Guidelines ranges, and the sentencing disparity between them was warranted").

Indeed, in the cases where the Third Circuit has reversed a sentence on the grounds of unwarranted disparity, it was because the sentence was substantially above or below the range, and not within the range, as Shnewer's sentence was. E.g., United States v. Lowry, 480 F. App'x 133, 135-36 (3d Cir. 2012) (120 month sentence, a 400% variance above the applicable Guidelines range of 24 to 30 months, was procedurally unreasonable where the court failed to consider § 3553(a)(6));[6] United States v. Garcia-Rivas, 241 F. App'x 830, 832 (3d Cir. 2007) ("it was unreasonable to consider the disparity between fast-track and non-fast-track districts in issuing a sentence of twelve months and one day when the advisory guidelines range was forty-six to fifty-seven months.").

2. Shnewer Cannot Show Prejudice.

Nor can Shnewer meet his affirmative burden of showing that he was prejudiced by Mr. Cipparone's litigation of the § 3553(a)(6) issue, because he cannot show that this Court would

[6] Shnewer repeatedly cites Judge Nygaard's concurring opinion in Lowry, which was not joined by the other two judges on the panel. SML5, 9, 20. In that concurring opinion, Judge Nygaard addressed an issue that apparently was not raised by the appellant: that counsel was ineffective for failing to adequately object to the above-guidelines sentence on the ground of § 3553(a)(6). But whereas the panel "majority believe[d] that counsel adequately raised the sentencing disparity, obligating the District Court to address it," Judge Nygaard "d[id] not." Id. at *3. Nor was there any indication in the opinion that the Government had claimed that the issue had not been preserved below. Thus, according to the panel majority, Judge Nygaard's opinion was based on an issue that was not presented in the appeal.

Moreover, although Judge Nygaard acknowledged that claims of ineffective assistance are not normally addressed on direct appeal, he did not conclude that counsel in Lowry was ineffective for failing to press the § 3553(a)(6) claim more vigorously, but concluded that counsel failed "raise the sentencing disparity at the sentencing hearing" at all. Id. at *3. Here, Mr. Cipparone **did** raise the issue.

have imposed a lower sentence had Mr. Cipparone more vigorously pressed that issue. See United States v. Booze, 293 F.3d 516, 520 (D.C. Cir. 2002) (rejecting the claim that "a better prepared lawyer could have argued more effectively that some of the drug transactions conducted by [defendant's] brothers should not have been attributed to [defendant]," because "[e]ven a better prepared lawyer . . . had no reasonable prospect of getting [defendant] a lower sentence").

Shnewer effectively concedes that he cannot show that he would have received a lower sentence had Mr. Cipparone more forcefully pressed the § 3553(a)(6) claim. Instead, he argues that he is not required to make such a showing. In support of that claim, he points to this Court's opinion in United States v. Mannino, 212 F.3d 835 (3d Cir. 2000). SML7-8. Calculating the applicable Guidelines offense level in that case, the district court attributed to the defendants all heroin distributed throughout the life of the conspiracy, even though the defendants did not join the conspiracy until well after it started. Id. at 838. Defense counsel challenged that finding at sentencing, but failed to raise it on direct appeal. Id. at 839. Defendants then alleged in their § 2255 motions that prior counsel were ineffective for failing to press their challenge to the district court's drug amount determination on direct appeal. Id. The district court rejected those claims as procedurally defaulted, but the Third Circuit granted a certificate of appealability and reversed.

The Third Circuit first concluded that the drug amount calculation was incorrect under the relevant conduct rules of U.S.S.G. § 1B1.3, Amendment 78 to the Sentencing Guidelines, and United States v. Collado, 975 F.2d 985 (3d Cir. 1992). 212 F.3d at 840-42. The Third Circuit also held that prior counsel's failure to raise this meritorious claim on direct appeal had no reasonable strategic or tactical basis, and was caused entirely by counsels' "oversight," as the lawyers themselves admitted in their affidavits in support of the § 2255 petitions. Id. at 842-44.

As for the prejudice prong, the Third Circuit rejected the Government's claim that petitioners had failed to show that they would have received a lower sentence had the district court correctly calculated the offense level. "The test for prejudice under Strickland is not whether petitioners would likely prevail upon remand, but whether we would have likely reversed and ordered a remand had the issue been raised on direct appeal." 212 F.3d at 844.

Mannino does not control here for several reasons. First, as a pre-Booker decision, its analysis was based on the then prevailing law that the Guidelines were mandatory, not advisory. "Mandatory Guidelines meant that a sentencing court had discretion to sentence outside the Guidelines range only as prescribed by the Guidelines." United States v. Blue, 557 F.3d 682, 685 (6th Cir. 2009). "Under the pre-Booker mandatory Guidelines regime, the departures outlined in Chapter 5 of the Guidelines provided a sentencing court with limited authority to impose a sentence outside the Guidelines range by considering 'specific offender characteristics,' 'substantial assistance to authorities,' or 'other grounds for departure' as described in Chapter 5 of the Guidelines." Id. (citing U.S.S.G. §§ 5H, 5K, 5H1.1 (introductory commentary). Absent a valid basis for a departure, a pre-Booker sentence imposed outside the properly calculated Guidelines range was presumptively erroneous. See 18 U.S.C. § 3553(b); Williams v. United States, 503 U.S. 193, 201-02 (1992). Although the district court in Mannino could in theory have imposed the same sentence even after it had properly calculated a substantially lower guidelines range, 212 F.3d at 847, it likely would not have done so.

Here, however, this Court properly recognized at Shnewer's sentencing, Shnewer Sent. Tr. 48, Shnewer PSR, p.3, that the Guidelines range in this case was advisory, not mandatory. Unlike the district court in Mannino, this Court recognized at sentencing that it had substantial discretion to vary below the Guidelines range pursuant to the factors identified in 18 U.S.C. § 3553(a). Unlike Mannino, any error in calculating the applicable offense level would not have locked this Court into a range from which the sentence would presumptively have to come.

Second, this Court properly calculated the applicable Guidelines range for Shnewer, as the Third Circuit confirmed when it rejected Shnewer's challenges to the terrorism and official victim enhancements. 671 F.3d at 351, 353. Thus, unlike the situation in Mannino, Shnewer was not saddled with a Guidelines range that overstated the seriousness of his offense. And claims such as Shnewer's, that the sentencing court should impose a sentence below the properly calculated Guidelines range in order to satisfy the anti-disparity policy of § 3553(a)(6), is one that typically fails. E.g., United States v. Kluger, 722 F.3d 549, 568 (3d Cir. 2013); United States v. Begin, 540 F. App'x 86, 90 (3d Cir. 2013); United States v. Underwood, 507 F. App'x 223, 228 (3d Cir. 2012); United States v. Jones, 476 F. App'x 484, 491 (3d Cir. 2011).

Moreover, the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), is just one factor (if relevant) that should be balanced against the others (again, if relevant)." Charles, 467 F.3d at 833. Consequently, this Court would have acted well within its discretion by denying such a requested variance, no matter how compelling the arguments in favor the variance were presented. Id.

Shnewer can satisfy neither the performance nor the prejudice prongs of Strickland. His claim that Mr. Cipparone was ineffective in his handling of § 3553(a)(6) at sentencing and on appeal should be rejected.

B. Mr. Cipparone Reasonably Declined To Raise A Meritless Claim That This Court Imposed A Harsher Sentence On Shnewer Because Of His Muslim Religion.

1. This Court Did Not Increase Shnewer's Sentence Because He Was a Devout Muslim.

Shnewer claims that this Court increased his sentence because he was a devout Muslim. He identifies nothing during his sentencing hearing to support that claim. Rather, he points to a passing remark of this Court while sentencing codefendant Serdar Tatar. SML22. That remark provides no support for Shnewer's baseless claim that this Court improperly increased his sentence because of his religious faith or the depth of his religiosity. If there can be any possible doubt about that, this Court can lay it to rest by explaining in its ruling on this claim that it did not increase the sentence for those improper reasons.

The entire premise for Shnewer's claim on this point is plainly incorrect. The Court's remarks, read in context, were as follows:

> I asked the government the question, what motivated this man [codefendant Tatar]. And it's the Government's position [that] it's religious fervor. And indeed he does say it, "I'm doing it in the name of Allah." But that's all he ever really says. That's the only time he ever invokes the name of the Lord. The only time he ever invokes a religious reason for doing any of this. And I'm not impressed with it.
>
> I know a lot of people who invoke the name of their God. Very religious people, and I come away with this, simply not convinced by a preponderance of the evidence that he was driven to do this by any ideology of hatred or any religious fervor.
>
> I am absolutely convinced that he was going through with this, he was going to help this, he would do what he can do and to make this happen. That they were going to kill American soldiers merely because of the status.
>
> But what drove him was not what drove the other four defendants in this case. And that makes a difference. It makes a big difference. Because he's the only one of these defendants who I have any hope of rehabilitating through a prison sentence. The others are so consumed with hatred and their ideology of theirs that they're never going to change. I'm not convinced the same is true of Mr. Tatar.

Tatar April 29, 2009 Sent. Tr. pp. 67-68.

Shnewer's premise, that the foregoing passage demonstrates that this Court imposed a harsher statement on **Shnewer** because the Court was "not impressed" with **Tatar's** "religiosity," is not only nonsensical, but a corruption of this Court's explanation at Tatar's sentencing. According to Shnewer, this Court imposed a lower sentence on Tatar than on Shnewer because Tatar invoked the name of Allah only once, whereas Shnewer did so repeatedly. SML23. But the Court offered no opinion about Tatar's religiosity (or Shnewer's, for that matter), and certainly did not denigrate the religiosity of either defendant. What the Court was "not impressed with" was the Government's stated hypothesis that Tatar joined the conspiracy because of his adherence to radical Islam. As the premise for Shnewer's claim is a fiction, the claim itself cannot succeed.

Shnewer's contention that this Court increased his sentence because Shnewer was a devout Muslim, SML24, thus finds no support in the record. And this Court was entirely justified in finding that Shnewer posed an increased risk of recidivism and future harm because he was motivated by a particular ideology grounded in his violent perception of Islam. Shnewer Sent. Tr. 51. Although a sentencing court may not impose a harsher sentence because of a defendant's religious beliefs, it is permitted to consider the defendant's likely future conduct. Specifically, the court is required the "consider the need for the sentence imposed" to, inter alia, "afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(1)(B) and to "protect the public from further crimes of the defendant," § 3553(a)(1)(C).

After finding that Tatar's motivations for joining the conspiracy were not rooted in strong ideological hatred, the Court reasonably concluded that he was more amenable to rehabilitation than the other defendants, who were possessed by an ideology that appeared to be impervious to moderating influences. On the other hand, this Court acted well within its broad sentencing discretion, and did not clearly err, by concluding that Shnewer's rigid adherence to violent Islamic jihad substantially diminished the likelihood of his successful rehabilitation.

2. **This Court Permissibly Considered Shnewer's Likelihood Of Ideologically Inspired Recidivism In Fashioning An Appropriate Sentence.**

Moreover, "the sentencing authority has always been free to consider a wide range of relevant material." Dawson v. Delaware, 503 U.S. 159, 164 (1992)(citing Payne v. Tennessee, 501 U.S. 808, 820-21 (1991). See also United States v. Tucker, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"). Although "the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs," Dawson, 503 U.S. at 163, "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," id. at 165.

Shnewer contends that this Court "appeared, upon the plain meaning of his words, to connect mainstream religious expression

-- invocation of the name of God -- to radical ideology." SML24. See also SLM25 ("the court also relied at least in part on evidence of [Shnewer's] mainstream religious expression" and improperly "conflated" Shnewer's "mainstream" religiosity and his radical jihadist leanings). But the Court's point in the challenged remarks was precisely the opposite: Tatar's invocation of the name, "Allah," was **not** evidence that he subscribed to a violence ideology. By the same token, the Court never suggested, at either the Tatar or the Shnewer sentencings, that a defendant's adherence to Islam, and in particular, to a fervent devotion to Islam, made either defendant or their crimes more deserving of punishment. This Court would have engaged in prohibited punishment because of religious beliefs only if the sentence was based on religious beliefs, but there is simply no evidence in the record that it did so.

In a similar setting the Supreme Court rejected a First Amendment challenge to a sentencing court's consideration of relevant evidence of a defendant's racial intolerance and subversive advocacy, including his desire to start a "race war." See Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion). The trial evidence here similarly showed Shnewer's willingness to participate in a war between Muslims and "infidels." See Government's Trial Exhibit 606B, p.7, transcript of conversation on August 2, 2006, Exhibit F hereto, in which Shnewer stated "I love to kill Jews. I tell you this, in all honesty, that it is a dream of mine. . . . It is a dream of mine to kill Jews in my land (of Palestine).") Accord, United States v. Stewart, 65 F.3d 918, 930-932 (11th Cir. 1995) (in a prosecution for conspiracy to violate civil rights, the sentencing court permissibly considered the racial bigotry of defendant, the "Grand Dragon" of the Ku Klux Klan).

3. Shnewer's Belief That Islam Supported Violent Jihad Did Not Prevent This Court From Increasing The Sentence Because Shnewer Is A Dangerous Fanatic.

The fact that Shnewer's violent ideology was cloaked in religious belief did not place that fact off limits from the sentencing court's permissible consideration. In United States v. Yaghi, 2012 WL 147955 (E.D.N.C. 2012), the defendant was convicted following trial for (1) conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A; and (2) conspiracy to murder, kidnap, maim and injure persons in a foreign country in violation of 18 U.S.C. § 956(a). The district court noted that the crimes were motivated by "a destructive ideology, cloaked in adherence to an extremist view of Islam, which propagated violence against anyone perceived as being in Muslim lands unjustly, coupled with his demonstrated disregard for the law." Id. at *4. This "underscore[d] this defendant's dangerousness." Id. "Defendant was ready, willing, and did so act to further violence," and "plunged himself for several years into radicalism." Id. The Court imposed concurrent sentences of 380 months for the two crimes, designed to "promote respect for the law, deter this type of conduct, and protect the public." Id.

To be sure, U.S.S.G. § 5H1.10 states that "religion," like "race, sex, national origin, and creed" are "not relevant in the determination of a sentence." But the purpose of that provision is to prevent sentencing judges from showing favoritism or animosity towards a defendant because of those characteristics. It does not prevent the sentencing court from considering any relevant evidence about religion.

For instance, in United States v. Gunderson, 211 F.3d 1088 (8th Cir. 2000), the district court did not violate § 5H1.10 when it pointed out the incongruity between the defendant's role as the head of a "Christian counseling service," and his offense. Those remarks "properly reflect[ed] the inconsistency between [defendant's] assumption of moral leadership with respect to his clients and his simultaneous commission of bankruptcy fraud." Id. at 1089. This was a permissible "inquiry into the degree of a defendant's blameworthiness," which "is entirely appropriate to the court's selection of a sentence within the guidelines range." Id.

Similarly, in United States v. Culbertson, 406 F. App'x 56 (7th Cir. 2010) (not precedential), the sentencing court did not violate § 5H1.10 when it told the defendant that she "come from a Catholic family and went through Catholic grade school, as I did" where she should have learned about "right and wrong." "[T]he district court [] did not rely on Culbertson's Catholicism to determine her sentence." Id. at 59.

Likewise here, this Court did not impose a harsher sentence on Shnewer because he was a Muslim as opposed to a Christian, Jew, or Buddhist. Rather, the Court appropriately considered a highly relevant factor of Shnewer's character, his eagerness to commit violent crimes in furtherance of an ideology that claimed Islam as its source.

None of the cases cited by Shnewer support this claim. United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) involved the high-profile prosecution of a nationally-known televangelist for fraud. During sentencing, the judge stated that Bakker "had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests." 925 F.2d at 740. The Court of Appeals ordered that Bakker be resentenced, because those remarks "create[d] the perception of the bench as a pulpit from which [the] judge[] announce[d] [his] personal sense of religiosity and simultaneously punish[ed] [the] defendant[] for offending it." Id. Nothing of the kind happened here, and indeed Shnewer does not even contend that this Court increased the sentence because Shnewer offended this Court's "sense of religiosity." Indeed, this Court said nothing during any portion of these proceedings regarding its own religiosity, or lack thereof. See United States v. Traxler, 477 F.3d 1243, 1249 (10th Cir. 2007) (distinguishing Bakker and finding no error where the sentencing judge "referred to the Apostle Paul's letters as a way to illustrate that something good can come from difficult circumstances, even jail," but "the record does not support a view that [defendant] received a harsher sentence because of the judge's personal religious principles").

In United States v. Hatchett, 923 F.2d 369 (5th Cir. 1991), the Government confessed error because the district court expressly increased Hatcher's sentence because of his privileged socioeconomic background, even though U.S.S.G. § 5H1.10, which was mandatory when Hatchett was sentenced, forbade consideration of that factor. Id. at 373-75, overruled on other grounds, United States v. Calverly, 37 F.3d 160, 163 n. 20 (5th Cir. 1994). Here, by contrast, this Court did not increase Shnewer's sentence because of his religious beliefs.

And at least Bakker and Hatchett received remands for resentencing. The defendant in United States v. Williams, 937 F.3d 979 (5th Cir. 1991), also cited by Shnewer, did not even get that far. There, the Court of Appeals rejected the defendant's contention that the district court had impermissibly enhanced the sentence because the defendant's father had once run for governor of Texas, where the court stated that defendant's privileged background was "even more reason for [the defendant] not to disappoint" his parents. Id. at 982. The Court of Appeals noted that the district court's statements about defendant's father's political activities were "merely observations made by the district court," and did not result in a harsher sentence. Id. Mr. Cipparone acted well within the broad confines of constitutionally effective advocacy by declining to raise a meritless claim that this Court increased Shnewer's sentence because of his religion.

Finally, even if the present record leaves some ambiguity on this point, that can be easily remedied. This Court can lay to rest during these § 2255 proceedings any contention that in sentencing Shnewer, it was motivated by improper considerations of supposed religious bigotry rather than proper considerations of deterrence and rehabilitation.

C. Mr. Cipparone Was Not Ineffective Regarding His Discussions With The Government About A Possible (But Never Ultimately Delivered) Plea Offer.

1. The Government Never Made A Formal Plea Agreement Offer To Shnewer.

The Government has submitted the declarations of the only two persons with firsthand knowledge about the Government's discussions with the defense about a possible non-trial disposition of the charges in this case: Mr. Fitzpatrick and Mr. Cipparone. Those declarations consistently state that the Government never tendered a formal plea offer to Shnewer. Rather, there was only a general discussion between Mr. Fitzpatrick and Mr. Cipparone in which the Government insisted that any guilty plea would have to allow for the imposition of a sentence of life imprisonment, and that any plea agreement would have to expressly allow the Government to seek a sentence of life imprisonment. See Fitzpatrick Declaration at ¶¶ 4-9; Cipparone Declaration at ¶¶ 10-17.

Shnewer has submitted his own declaration regarding this issue, in which he asserts that: (a) he encouraged Mr. Cipparone to enter into plea discussions with the Government on his behalf, Shnewer Declaration ¶ 5; (b) he wanted to plead guilty in this case because he recognized that he would be convicted at trial, id. at ¶¶ 2-4; (c) would have accepted a plea offer had it been tendered to him, id. at ¶ 8; and (d) Mr. Ciparrone "never told me about any plea offers or discussions that he had with the prosecution, at any time before," id. at ¶ 7. But Shnewer does not and cannot claim that the Government ever presented Mr. Ciparrone with a formal plea offer.

Shnewer nevertheless contends that Mr. Cipparone was ineffective because he did not communicate a plea offer from the Government to Shnewer. SML II(D). He claims that, owing to his belief that the evidence of his guilt was overwhelming, he would have accepted any plea offer that would have given him the chance to obtain a sentence of less than life imprisonment. SML26-29. He argues that, had he been permitted to plead guilty, he likely would have received a sentence of less than life. SML 30-39.

Shnewer points to a standard discovery letter, dated June 22, 2007, from Assistant United States Attorney Stephen Stigall to Mr. Cipparone, which discussed the one point reduction in the offense level pursuant to U.S.S.G. § 3E1.1(b) for prompt acceptance of responsibility, which would be lost if Shnewer "has not entered a plea of guilty before the filing of pre-trial motions." (Exhibit 5 to SML, Declaration of Mohammad Shnewer, ¶ 5). Shnewer also points to the Declaration of First Assistant United States Attorney William Fitzpatrick regarding his ultimately fruitless discussion with Mr. Cipparone regarding a possible plea agreement (Docket 10-1).

In support of this claim, Shnewer invokes Missouri v. Frye, SM17, in which the Supreme Court "h[e]ld that, as a general rule, defense counsel has the duty to communicate **formal offers** from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." 133 S.Ct. 1399, 1408 (2012) (emphasis added). The Court explained that "the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations." Id. at 1409.

Shnewer's claim fails. AUSA Stigall's letters to Mr. Cipparone plainly did not contain a formal offer to Shnewer regarding a possible guilty plea agreement. And as Mr. Fitzpatrick's Declaration explains, the Government never made a formal plea offer to Mr. Cipparone. Fitzpatrick Decl. at ¶ 3. Mr. Cipparone's June 17, 2014 Declaration, attached as Exhibit A to this memorandum, fully corroborates Mr. Fitzpatrick's sworn statement on that point. Cipparone Decl. at ¶¶ 10-17. In particular, Mr. Cipparone has attested that neither Mr. Fitzpatrick nor anyone else from the U.S. Attorney's office "conveyed to [Mr. Cipparone] a formal offer for Mr. Shnewer to enter into a plea agreement with the United States." Cipparone Decl. at ¶ 16. Shnewer offers nothing by way of an affidavit or otherwise to contradict Mr. Fitzpatrick's and Mr. Cipparone's mutually corroborating assertions that no formal offer was ever offered to Shnewer.

2. **Mr. Cipparone Was Not Required To Inform Shnewer About Discussions With The Government That Did Not Result In A Formal Plea Offer.**

As there was no "formal offer" presented by the Government, Frye and its progeny have no bearing on this case. See Merzbacher v. Shearin, 706 F.3d 356, 369–70 (4th Cir. 2013) (reversing the grant of habeas relief for ineffective assistance due to a supposed failure to communicate a plea offer; where the prosecution's offer "finalized only one leg of a putative plea agreement, the length of sentence[,] and did not finalize the other legs," no formal plea offer was made);[7] United States v. Hill, 2014 WL 186098, *2 (N.D.Ga. 2014) (rejecting a Frye claim where "there was no plea agreement"; "[a]t the evidentiary hearing, defense counsel and the prosecutor both testified that there were preliminary discussions about the possibility of a guilty plea but that no offer was made and no agreement was reached.").

"The threshold issue for the Court therefor is whether the Government ever extended a formal plea offer to the Defendant in the first instance." Compean v. United States, 2013 WL 6196517, *7 (W.D. Ky. 2013). Because Shnewer has not even alleged, much less "show[n] by a preponderance of the evidence that the United States ever extended such a formal plea offer for [Mr. Cipparone] to convey," Shnewer's "Sixth Amendment claim will fail at its inception. Nothing else need be shown for the government to prevail." Id. "While no hard-and-fast rule exists, Frye made clear that the presence of a writing is a crucial fact when determining whether a formal plea offer has

[7] Shnewer cites Merzbacher in support of his claim, SML 32, n.2, but that decision cuts directly against him.

been tendered by the Government." United States v. Petters, -- F. Supp. 2d. --, 2013 WL 6328544, *3 (D. Minn. 2013) (rejecting a Frye claim and citing Davidson v. United States, 2013 WL 1946206, *5 (E.D. Mo. 2013) which found no formal plea offer "in light of the absence of any documentation of this alleged deal")." See also United States v. Waters, 2013 WL 3949092, *8 (E.D.Pa. 2013) ("While we have been unable to find any authority defining the requisite elements of a formal plea offer, it is clear that an oral discussion of the sentencing range for a possible plea agreement that does not include an agreement on the charges to which the defendant will plead guilty and the facts that he will admit, does not constitute a formal plea offer.").

Even had Shnewer presented more evidence of the existence of a formal offer than he has, he still would not be entitled to relief. See Easley v. MacDonald, 2013 WL 6834638, *10 (C.D. Cal. 2013) (rejecting a Frye claim where "[p]etitioner has failed to make the requisite showing of deficient performance based on trial counsel's alleged failure to convey a four-year plea offer," where he did not "cite any evidence from the trial record to establish that a four-year plea offer was actually conveyed to the defense" or "proffer sworn statements from the district attorney or trial counsel regarding the alleged offer," and his "self-serving declaration" "consist[ed] of multiple layers of hearsay and fails to identify the specific terms of a plea bargain"). See also Jackson v. United States, 2013 WL 5636691, *3 (D. Or. 2013) (denying § 2255 relief where petitioner alleged "no more than that [an Assistant United States Attorney] made an offer to recommend a twenty-year sentence, and that his counsel somehow prevented him from accepting it," but did not "allege to whom [the] AUSA [] made the offer, how the offer was communicated, or whether it was in writing"). Consequently,

> [t]his case is [] materially distinguish[able] . . . from the facts of . . . Frye, which involved a situation[] where the prosecutor had extended a formal offer.

Compean, 2013 WL 6196517, *8 (quotation marks omitted).

Simply put, Mr. Cipparone had no constitutional duty to keep Shnewer informed of his negotiations with the Government that did not resulted in a formal plea offer. Because Shnewer has not "raised an issue of material fact [] that the Government ever extended a formal plea offer in his case," and "undisputed portions of" Mr. Fitzpatrick's and Mr. Cipparone's declarations "diametrically show otherwise," Mr. Cipparone "could not be held to be ineffective for allegedly failing to convey a plea offer that never existed in the first instance." Compean, 2013 WL 6196517, *7.

Shnewer also points to the pre-Frye case of United States v. Day, 969 F.2d 39, 44 (3d Cir. 1992), SML27, but that case offers him no more support than Frye. In Day, a § 2255 petitioner alleged that "on the day that his trial was to begin," his lawyer "informed him that the government had offered a five-year sentence as part of a plea bargain," but "allegedly did not explain or discuss the merits of the offer, as opposed to standing trial," nor "discuss the (overwhelming) strength of the government's case," and incorrectly informed petitioner that "the maximum sentence was only eleven years." Id. at 42. Following his conviction at trial, petitioner, a career offender, was sentenced to over twenty-one years in prison. Id. at 41.

The district court dismissed the petition without a hearing, but the Court of Appeals reversed. It directed the district court to conduct a hearing to determine whether the Government had made such an offer, and whether, if it had, petitioner would have accepted it rather than going to trial, had he been properly informed about his sentencing exposure following a conviction at trial. Id. at 46-47. The obvious distinguishing feature between Shnewer's case and Day is that, similarly to Frye, relief would be unavailable in Day unless the Government made a firm plea offer that capped Day's sentence. Shnewer does not contest the declarations of Mr. Fitzpatrick and Mr. Cipparone that no such offer was made here.

As Shnewer's claim fails for want of a formal plea offer, his arguments that he would have accepted an offer had it been tendered, and that he would have received a lower sentence had he pleaded guilty, SML30-39, are of no moment. This claim should be dismissed without an evidentiary hearing.[8]

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[8] Shnewer cites United States v. Gordon, 156 F.3d 376 (2d Cir. 1998) (miscited at SML32, n.2) for the proposition that "whether there was a 'formal' plea offer or something more exploratory is not material to the prejudice inquiry." Id. But Gordon did not involve a claim such as Shnewer's that counsel was ineffective because he failed to convey a plea offer to his client, or failed to keep his client apprised of plea negotiations. In Gordon, counsel grossly underestimated his client's sentencing exposure if he was convicted at trial, Gordon relied on that miscalculation in declining to pursue additional plea negotiations, was convicted at trial on all counts, and received a sentence of 210 months that was ninety months longer than counsel had advised he would receive if convicted. Id. at 377-78.

Under those circumstances, "the district court noted that whether the government had made a formal plea offer was irrelevant because Gordon was nonetheless prejudiced because he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial," and the Court of appeals "agree[d]." Id. at 380. Gordon's decision not to continue plea negotiations prejudiced him as the Government had discussed the possibility of a plea agreement that would have resulted in a sentence of 84 months before negotiations ended. Id. at 378.

Shnewer, by contrast, makes no claim that Mr. Cipparone misinformed him about his potential sentencing exposure, much less that he declined to pursue further plea negotiations because of that mistakes. To the contrary, he asserts that Mr. Cipparone correctly informed him that he faced a sentence of life imprisonment if convicted. Shnewer Affidavit at ¶ 4.

3. Shnewer Cannot Show Prejudice.

Even if Mr. Cipparone had somehow fallen below the Constitutional standard for reasonable representation with respect to his plea discussions with the Government (he did not), Shnewer would still not be entitled to relief because he cannot show prejudice. As Shnewer concedes, SML31, had he pleaded guilty to the Count One conspiracy charge, as the Government would have insisted in any plea agreement, see Fitzpatrick Declaration at ¶¶ 4-8, and had his offense level accordingly been reduced by three levels pursuant to U.S.S.G. § 3E1.1, he still would have been facing an offense level of 48 and criminal history category of VI, which still would have generated the same Guidelines range of life imprisonment.

Indeed, Shnewer could not have escaped a Guidelines range of life imprisonment unless this Court had reduced his offense level to 42, a nine-level reduction. See U.S.S.G., Chapt. V, Section 1, Sentencing Table. But Shnewer does not suggest that there was any basis for this Court to reduce the offense level to anything lower than 48. Nor could he. After all, the Third Circuit affirmed the application of the terrorism and official victim enhancements that were the primary drivers of Shnewer’s offense level and criminal history category.

Shnewer claims that several factors would have militated in favor of a sentence of less than life imprisonment had he pleaded guilty. First, he points out that had he pleaded guilty shortly after he was indicted, he would have allowed the Government and the Court to substantially conserve their resources. SML31-32. But those savings already would have been fully reflected in the "third point" reduction of the offense level under U.S.S.G. § 3E1.1(b). As noted above, because Shnewer started out at the literally "off the chart" level of 51, the three-level downward adjustment would still have left him at the "off the chart" offense level 48. There is no reasonable likelihood that this Court would have granted an additional six-level downward offense level variance to give additional consideration for Shnewer's guilty plea that had already been fully accounted for under § 3E1.1.

Second, Shnewer contends that had he pleaded guilty, he would have expressed "extreme remorse" for his conduct. SML32. Of course, nothing prevented Shnewer from expressing remorse for his crimes at his sentencing following his guilty verdicts, but he declined to do so. Doubtless, expressions of remorse are more convincing following a guilty plea than following a conviction after a trial. But any claims of remorse by Shnewer would have been severely undermined by his repeated expressions of ideological fervor in the recorded conversations (e.g., "it is a dream of mine to kill Jews in my land", Tr. 4168) and his obsessive plans to commit mayhem by, inter alia, blowing up a tanker truck containing a flammable material at the gate of a military base and then shooting to death any soldiers who were exposed to gunfire as a result of that explosion, Tr. 2837-40, 3386-87.

This was not a case where Shnewer could plausibly argue that he was drawn to criminality because of financial hardship, a dysfunctional upbringing, addiction, or mental or emotional illness. Nor was the crime impulsive or a spontaneous reaction to a startling event. Shnewer was not driven to radicalism by his parents or other authority figure. See Shnewer PSR, ¶¶ 282-87. Rather, he elected as an adult to devote himself to violent jihad. Even had Shnewer expressed remorse for his conduct, he has not shown a reasonable likelihood that this Court would have found that remorse so genuine, compelling, and deserving of consideration as to reduce the sentence to less than life imprisonment.

Third, Shnewer contends that, had he pleaded guilty, this Court would not have been exposed to the extensive evidence of his guilt that the Government presented at trial. SML33-35. The premise of this claim is incorrect. Even had Shnewer pleaded guilty, this Court still would have presided over the trial of Shnewer’s four co-defendants (none of whom claim that they were improperly denied the opportunity to enter into a plea agreement with the Government, or claim that they would have pleaded guilty had any offer been forthcoming). At the trial of Shnewer's four co-conspirators, this Court would have heard virtually the same evidence of Shnewer's conspiratorial activities that it heard at Shnewer's trial, because Shnewer was a central figure in the conspiracy, and his recorded conversations that were in furtherance of the conspiracy were relevant to the charges against all of his coconspirators.

And even had there been no trial of any of the conspirators, this Court would have still learned the full extent of Shnewer's criminal conduct. Not only would Shnewer's offense conduct have been set forth in the Presentence Investigation Report, Fed. R. Crim. P. 32(c), (d), but the Government, determined to obtain a sentence of life imprisonment for Shnewer even had he pleaded guilty (see Fitzpatrick Declaration at ¶¶ 4-8), would have provided the Court at Shnewer's sentencing with all of the incriminating evidence against Shnewer. It certainly would have given the Court and thoroughly summarized and analyzed all of Shnewer's deeply incriminating recorded conversations that, according to Shnewer, caused this Court to impose the life sentence. SML34-35. Contrary to Shnewer's assumption, this Court would not have had a more favorable view of Shnewer and his crime had he pleaded guilty.

Fourth, Shnewer contends that, had he pleaded guilty, his lawyer would have urged the Court to impose a lower sentence by pointing to the sentences of other defendants who had committed crimes that were supposedly similar to Shnewer's and yet received sentences of less than life imprisonment. SML35-36. But as Shnewer acknowledges, this is essentially the same claim that he presents in the first point of his § 2255 motion. Id. For the reasons demonstrated above regarding that point, Shnewer cannot show a reasonable probability that such an argument would have resulted in a lower sentence.

Fifth, Shnewer contends that, had he pleaded guilty, and his attorney recognized that the Government had charged him with a non-offense in Count Four, his sentence likely would have been lower. SML36-38. But Shnewer has already obtained the full benefit from the belated recognition of that error. As this Court well knows, the Government belatedly discovered and conceded the error during the direct appeal, 671 F.3d at 353, the Court of Appeals remanded this case to this Court for resentencing without consideration of Shnewer's conviction on Count Four, id. at 356, and this Court imposed the same life sentence for Shnewer's conviction on Count One, but without the consecutive sentence imposed on Count Four. Crim. Docket 467.

Shnewer creatively argues that, had counsel identified the defect in Count Four in conjunction with guilty plea negotiations,

> effective counsel at the plea negotiation stage would have acted to take the mischarged § 924(c) count off the table, thereby strengthening [Shnewer's] bargaining position and, it is reasonable to assume, resulting in a plea offer that, at the very least, would have had a reasonable probability of securing him a sentence of less than life in prison.

SML38.

The problem with this argument is that Mr. Fitzpatrick's Declaration demonstrates that the Government would have insisted that any plea agreement with Shnewer would have allowed the Court to impose a sentence of life imprisonment, and would have permitted the Government to advocate for a sentence of life imprisonment. See Fitzpatrick Declaration at ¶¶ 4-8. Accordingly, "it is **not** reasonable to assume" that the Government would have given Shnewer "a plea offer that . . . would have had a reasonable probability of securing him a sentence of less than life in prison."

Rather, any plea agreement that Shnewer would have obtained would most likely have resulted in total offense level of 48, a criminal history category of VI, and a Guidelines range of life imprisonment, leaving Shnewer largely in the same position he was in when he was sentenced by this Court following remand.

Thus, although a person who pleads guilty often receives a lower sentence than one who, everything else being equal, goes to trial, this is a case where a guilty plea likely would have resulted in the same life sentence that Shnewer received after standing trial. No prejudice occurs in such a situation. See United States v. Fabian, 798 F.Supp.2d 647, 673-76 (D.Md. 2011) (§ 2255 petitioner who pleaded guilty and alleged ineffective assistance because his attorney failed to claim that the indictment had been constructively amended failed to demonstrate prejudice; had defendant pleaded guilty to a properly returned indictment, the Guidelines range and resulting sentence likely would have been the same); see generally United States v. Cox, 59 F. App’x 437, 439 (2d Cir. 2003) (not precedential) (no prejudice from counsel’s failure to seek suppression of some of the drugs involved in the offense where the Guidelines range would not have changed had those drugs been excluded from the drug amount that established the Guidelines offense level).

Conclusion

For the foregoing reasons, the United States respectfully requests that this Court dismiss Shnewer's motion in its entirety and deny a certificate of appealability as to those claims.

Respectfully submitted,

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Date: July 8, 2014
Camden, New Jersey

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014, I served a paper copy of the attached United States' Response To Petitioner's Amended Motion Under 28 U.S.C. § 2255, together with the attached exhibits, on:

Mohamad Shnewer
BOP Inmate # 61283-066
Marion USP, Ill.
4500 PRISON ROAD
MARION, IL 62959
Case Manage:
By certified United States Mail, return receipt requested

I also served a copy of a compact disc containing copies of the transcripts of the trial and the sentencing hearing on Mr. Tatar's case manager at Marion USP, Gary Burgess.

/s/ Norman Gross
By: Assistant U.S. Attorney